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No. 84-769 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALBERT JOHN FERN, JR., ET AL., PETITIONERS

v.

JOAN TURMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners, retired military officers sued in state court by their former spouses to compel compliance with state divorce decrees, removed these actions to federal district court and brought separate lawsuits asking that the state divorce decrees be declared partially invalid. The complaints were dismissed on the basis of the domestic relations exception to federal diversity jurisdiction and the failure of petitioners to state a federal claim other than as a defense to an action grounded in state law. The cases were consolidated in the court of appeals, and the dismissals were affirmed (Pet. App. B1-B7).

1. Petitioners are two retired military officers, both required by California divorce decrees to pay a percentage of their military retired pay to their former spouses.

At the time the divorce decrees became final in 1974 and 1978, military retired pay was considered to be community property and divisible. When this Court decided *McCarty* v. *McCarty*, 453 U.S. 210 (1981), holding that federal law precluded a state court from dividing military retired pay pursuant to community property laws, both petitioners stopped making retirement payments to their former wives. The wives filed motions in California state courts to compel compliance with the divorce decrees, and these actions were removed by petitioners to federal district court, pursuant to 28 U.S.C. 1442a. Petitioners also filed their own complaints in federal district court, naming their former wives and the Secretaries of the Army and Air Force as defendants. They sought a declaration that the divorce decrees were invalid to the extent they required a division of retired pay, or in the alternative, a declaration that, if the divorce decrees were valid, the Secretaries of the Army and Air Force were required to remove petitioners from the list of retired officers subject to recall to active duty. Petitioners contended that retired pay represents pay for reduced but continuing services to the military, and that it would be inequitable for the Secretaries of the Army and Air Force to recall petitioners to active duty while directing part of their pay to their former spouses. In these lawsuits, jurisdiction was premised on diversity of citizenship, 28 U.S.C. 1332, and federal question jurisdiction, 28 U.S.C. 1331.

The district courts held (Pet. App. C1-C7; *id.* at D1-D10) that there was no diversity jurisdiction under 28 U.S.C. 1332 because the cases involved domestic relations, and no federal question jurisdiction under 28 U.S.C. 1331 because the only federal claims asserted by petitioners — that federal law prohibited the division of their retired pay — were purely a defense to state law causes of action. Pet. App. D4-D10. The courts accordingly dismissed the original

actions brought by petitioners. In addition, the district courts held that removal of the actions brought by petitioners' ex-wives was improper and remanded those actions to state court.[1]

The court of appeals consolidated the cases and affirmed, holding that the district courts did not abuse their discretion by invoking the marital relations exception to diversity jurisdiction and that there was no federal question jurisdiction to support petitioners' suits against their former wives. Pet. App. B3. The court of appeals stated that there might be federal question jurisdiction to support petitioners' claims against the Secretaries of the Army and Air Force (*ibid.*), but that these claims were not ripe for a decision. Until the state court proceedings were completed, and petitioners were ordered to relinquish a portion of their retired pay, the case against the federal defendants, in the court of appeals' view, was premature. *Id.* at B4-B5.

While the appeals to the Ninth Circuit were pending, Congress enacted the Uniformed Services Former Spouses' Protection Act (FSPA), 10 U.S.C. 1408 *et seq.* This statute allows state courts to treat military retired pay either as property of a member of the armed forces "or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." See 10 U.S.C. 1408(c)(1).[2] The

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[1]As petitioners note (Pet. 5 n.2), the district courts' determinations that removal was improper, with their consequent remand of petitioners' ex-wives' actions to state court, were not appealable orders. 28 U.S.C. 1447(d). No issue regarding those determinations is before this Court. The ex-wives' actions are currently pending in state court.

[2]10 U.S.C. 1408(c)(1) provides in relevant part:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Act became effective on February 1, 1983, although state courts are permitted to apply the statutory provisions to periods beginning after June 25, 1981. The statute's legislative history indicates that Congress intended the Act to nullify the effect of the *McCarty* decision. See H.R. Rep. 97-749, 97th Cong., 2d Sess. 49, 165-168 (1982).

2. The only issue of direct significance to the federal respondents is the court of appeals' holding that petitioners' claims against the Secretaries of the Army and Air Force are not ripe for review. Petitioners do not, however, raise this issue as one of their questions presented (see Pet. i). Nor, in their treatment of the issue in the argument section of the petition (*id.* at 50-52), do petitioners directly challenge the court of appeals' conclusion that they will have suffered no cognizable injury until and unless the state court proceedings result in a determination in their ex-wives' favor. Petitioners state simply that the claims against the federal respondents are "substantial" (*id.* at 50) and assert that the lower court's conclusion would result in "piecemeal litigation since the retired officers must separately proceed against the Secretaries if they are to have comprehensive relief" (*id.* at 51-52). These arguments, even if valid, have no relevance to the question decided by the court of appeals.[3]

In any event, the decision below regarding the claims against the federal respondents is clearly correct. Assuming, as did the court of appeals (Pet. App. B3), that there would be federal question jurisdiction over petitioners' actions to remove petitioners' names from the active duty recall roster

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[3]We do not see how allowing this suit for what may (depending on the result in state court) turn out to be an advisory opinion would avoid "piecemeal litigation." Since petitioners' ex-wives' actions have been remanded to state court and are currently in litigation there (a result not challenged in this petition (see note 1, *supra*)), to permit this action to continue in federal court would not, as petitioners suggest (Pet. 51), lead to "resolution of the dispute in one forum."

in the event petitioners were required to comply with the divorce decrees, these claims are not now ripe for review. As the court of appeals noted (*id.* at B4-B5), until the state court proceedings are completed, and a decision is rendered ordering petitioners to give up a portion of their retired pay, any injury to petitioners is entirely speculative. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967). If petitioners' arguments regarding their rights vis-a-vis their ex-wives ultimately are accepted by the California courts (or by this Court on review of the California courts' decision), there will be no need for them to pursue this action against the federal respondents.

3. Petitioners contend that the district courts were properly vested with diversity jurisdiction and federal question jurisdiction to hear their lawsuits. They assert, in essence, that judicial abstention from their cases was an abuse of discretion. We agree with respondents Turman and Adams that these contentions are without merit.

a. It is well established that federal courts do not exercise diversity jurisdiction over domestic relations claims such as those presented here. This is because "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States" (*In re Burrus*, 136 U.S. 586, 593-594 (1890)). This domestic relations exception to diversity jurisdiction has been recognized in federal jurisprudence for more than a century (see *Barber* v. *Barber*, 62 U.S. (21 How.) 582 (1858)), and is consistently applied by the federal courts. See, *e.g.*, *United States* v. *Yazell*, 382 U.S. 341 (1966); *Bennett* v. *Bennett*, 682 F.2d 1039 (D.C. Cir. 1982); *Cole* v. *Cole*, 633 F.2d 1083 (4th Cir. 1980); *Sutter* v. *Pitts*, 639 F.2d 842 (1st Cir. 1981); *Phillips, Nizer, Benjamin, Krim & Ballon* v. *Rosenstiel*, 490 F.2d 509 (2d Cir. 1973).

The Uniformed Services Former Spouses Protection Act makes states the final arbiters of how military retirement benefits are to be treated when there has been a final divorce decree. See 10 U.S.C. 1408(c). By making the division of retired pay a question of state rather than federal law, Congress evinced its view that the division of such pay involves local problems, peculiarly suited to state regulation and control. This is the very circumstance in which the domestic relations exception to diversity jurisdiction is traditionally invoked. Thus, petitioners' contention that the state court divorce decrees are void is one that should properly be heard in state court, with review by this Court for errors of federal law. Cf. *United States* v. *Morton*, No. 83-916 (June 19, 1984).

Petitioners contend (Pet. 32-33) that the instant case conflicts with *Erspan* v. *Badgett*, 647 F.2d 550 (5th Cir. 1981), cert. denied, 455 U.S. 945 (1982). However, *Erspan* was an action to enforce the terms of a final state divorce decree after the husband had declared bankruptcy; the Fifth Circuit upheld federal jurisdiction because the principal issue concerned bankruptcy law, the divorce decree was regarded as nothing more than a contract to pay money, and there was no pending state court action. See 647 F.2d at 553. By contrast, petitioners here do not seek execution of a state court judgment; they collaterally attack that judgment in federal court at a time when the very issues in dispute are being litigated in state court. Given these circumstances, the domestic relations exception to diversity jurisdiction clearly applies. See generally 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3609 (1975).[4]

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[4]Petitioners also contend (Pet. 26-30) that the courts of appeals have adopted different approaches to the domestic relations exception to diversity jurisdiction, characterizing the position of the Third and Ninth Circuits as "maximalist" (Pet. 26) and that of the Fifth Circuit as "narrower" (*id.* at 28). Whatever may be the abstract merit of these

b. Nor did the court of appeals err by failing to find federal question jurisdiction.[5] A case does not arise under federal law within 28 U.S.C. 1331 when the federal question is only an anticipated defense to a state law cause of action. *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, No. 82-695 (June 24, 1983), slip op. 7-9; *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936); see *Armstrong* v. *Armstrong*, 696 F.2d 1237 (9th Cir. 1983), cert. denied, No. 82-2139 (Oct. 31, 1983). Here, petitioners' claim that federal law bars division of their retirement payments is plainly a defense to the claims of their ex-wives for payments pursuant to the state divorce decrees. The actions therefore do not arise under the laws of the United States for purposes of federal question jurisdiction. See *Armstrong* v. *Armstrong, supra*.[6]

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generalizations, they do not create a conflict with respect to this case. The decision below concerns a dispute falling within the core of the domestic relations exception.

[5]Contrary to petitioners' assertion (Pet. 31), the court of appeals did not apply the domestic relations exception to the issue of federal question jurisdiction. Nor did the court invoke the abstention doctrines of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), or *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). Petitioners' argument concerning those doctrines (Pet. 44-48) is therefore irrelevant.

[6]In any event, the district court did not abuse its discretion to decline to adjudicate a declaratory judgment action under these circumstances. As one commentator has observed, "[t]he fact that another action, involving substantially the same issue, is pending in a state or federal court is a potent factor in the discretionary refusal to assume jurisdiction [over a declaratory judgment action]." 6A *Moore's Federal Practice* ¶ 57.08[3], at 57-44 (1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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